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# THE DEMISE OF THE REMEDY OF REINSTATEMENT IN EMPLOYMENT CONTRACTS: A NOTE ON RECENT DEVELOPMENTS

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## INTRODUCTION

Under the influence of the English Common Law, the old approach by South African courts to reinstatement as a remedy in cases of unlawful dismissal was uncompromising: Reinstatement was taken as an order for specific performance, which was said to be unavailable in employment contracts.<sup>1</sup> The employee was only entitled to an order for damages notwithstanding the unlawfulness of his dismissal. The admitted exception to this rule was with public service employees, whose position was said to be governed by statute, and any dismissal contrary to the statute, was always treated as a nullity.<sup>2</sup> English authorities which backed this approach are numerous.<sup>3</sup> In essence, this approach by the courts meant that employment contracts were in a class of their own, since specific performance was, in principle, available as a remedy in other cases of breach of contract.<sup>4</sup>

However, South African courts departed from this rigid approach to reinstatement. First was the case of *Stewart Wrightson (Pty) Ltd v Thorpe*.<sup>5</sup> which demolished the notion that employment contracts were different from other contracts so far as specific performance was concerned. The court emphasized that just like in the contracts, specific performance was in principle available for breach of an employment contract. The matter was then put beyond doubt in *National Union of Textile Workers v Stag Packing (Pty) Ltd & Another*,<sup>6</sup> where it was made clear that there was no rule against specific performance at least in employment contracts, although in many cases specific performance will be denied owing to the nature of the contract. This has been followed in subsequent cases.<sup>7</sup> Thus under this new approach, reinstatement is only available at the discretion of the court. Zimbabwean courts have adopted this new South African approach, which makes specific performance available in principle, for breach of an employment contract but subject to the discretion of the court.<sup>8</sup> It should be remarked, however, that even English courts have not remained rigid and have allowed, to some extent, exceptions to the general rule against reinstatement under the common law.<sup>9</sup>

1 *Schierhout v Minister of Justice* 1926 AD 99; *Grindling v Beyers* 1967 (2) SA 131 (W); *Stoop v Lichtenburg Town Council* 1952 (2) SA 72 (T); *Kubheka v Imextra (Pty) Ltd* 1975 (4) SA 484 (W.).

2 See in particular *Schierhout v Minister of Justice*, *supra*.

3 See for example *Ryan v Mutual Tontime Westminster Chambers Association* [1893] 1 CH 116; *De Francesco v Barrum* (1890) 45 ChD 430; *Chappel v Times Newspapers* [1975] 1 WLR 482.

4 *Farmers Co-operatives Society v Berry* 1912 AD 343.

5 1977 (2) SA 943 (A).

6 1982 (4) SA 151 (T).

7 See *Myburgh v Daniel Skuil Muninipaliteit* 1985 (3) SA 335; *Tshabalala & others v Minister of Health & Welfare* (1986) 7 ILJ 168].

8 See *Commercial Careers College (1980) Pvt Ltd v Jarvis* 1989 (1) CLR 344 (S); *Art Corporation v Moyana* 1989 (1) ZLR 304.

9 See *CH Giles & Co Ltd v Morris* [1972] WLR 307.

Two main reasons have always been given for both the outright denial of reinstatement and the discretionary granting of reinstatement. They were summarised by Innes CJ as follows:

the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship; and the absence of mutuality, for no court could by its order compel a servant to perform his work faithfully and diligently.<sup>10</sup>

It has also been said that damages are an adequate remedy anyway and in addition specific performance may potentially involve the oppression of the employee in being forced to work at the instance of the employer.<sup>11</sup>

Be that as it may, whether one takes the outright denial of reinstatement approach or the other in which the courts have a discretion to order or not to order reinstatement, the fact is that under the common law the remedy of reinstatement is virtually unavailable. With the latter approach, the discretion of the courts is usually exercised to deny reinstatement either on the ground of mutual incompatibility or disappearance of the trust that should exist between the two parties. It is precisely for this unavailability of reinstatement under the common law that the Labour Relations Act (Chapter 28:01) provides for some statutory regime of reinstatement. There is similar legislation in South Africa (see Labour Relations Act, no. 56 of 1996) and England (see Employment Protection Consolidation Act, 1978). However, the approach of the Zimbabwean Supreme Court in recent cases effectively makes statutory reinstatement virtually meaningless and no more than what would be permissible under the common law. This is difficult to reconcile with the very essence of employment protection legislation such as the Labour Relations Act.

### THE SUPREME COURT'S APPROACH TO STATUTORY REINSTATEMENT

Before 1992, the Labour Relations Act provided for statutory reinstatement in the following terms:

111 (1) After the due inquiry into, and consideration of any matter that has been referred to it . . . a determining authority may —

(a) make such order as it thinks appropriate for determining the dispute or rectifying the unfair labour practice concerned.

Without derogation from the generality of subsection (1) an order made in terms of that subsection may provide for or direct, as the case may be —

(a) back pay from the time of the dispute or unfair labour practice concerned.

(b) —

(c) reinstatement in a job

(d) as may be appropriate.

Clearly, reinstatement was one of the competent remedies that could be granted for unlawful termination of employment. The Act did not provide a hierarchy of remedies and, on the face of it, reinstatement was accorded an equal ranking with the other remedies. The common law approach of making reinstatement rare and an exception rather than the rule was overridden. On the contrary, given the dominant intention of the Act to improve the position of the worker by *inter alia* protecting employment and by adopting a purposive approach to interpretation, it is arguable that the Act reversed the common law approach

10 In *Schierhout v minister of justice supra* at p. 107.

11 See *Chappell v Times Newspaper Ltd* [1975] 1 WLR 482.



and made reinstatement the favoured remedy. Such an interpretation of the act was quickly shot down by the Supreme Court. In *Art Corporation Ltd v Moyana*.<sup>12</sup> McNally JA emphatically rejected any attempt to make reinstatement the favoured remedy. He did so without even examining the scheme of the Labour Relations Act. He had this to say:

The Tribunal appears to have taken the view that if the dismissal was unlawful Mr Moyana was *ipso facto* entitled to reinstatement. They found his dismissal was unlawful and therefore they ordered his reinstatement.

It seems to me with respect that in this the Tribunal was wrong. Reinstatement is not the only or the inevitable remedy for wrongful dismissal. It is a remedy for . . .<sup>13</sup>

This approach of making the Labour Relations Act provide for no more than the common law was endorsed by Gubbay JA in *Commercial Careers College v Jarvis*<sup>14</sup> when he avoided a very persuasive approach to the contrary. In the High Court, Sandura JP had taken the view that any termination of employment contrary to the Labour Relations Act was a nullity and accordingly the employee was entitled, as of right, to reinstatement. While Gubbay JA admitted the forcefulness of this approach, he however, refused to follow it and maintained that reinstatement depended on the discretion of the court. In his words: "I propose to adopt the approach that even where the unlawful dismissal relates to an employee whose tenure of employment is protected by legislation, the court retains a discretion to consider whether it is appropriate to order reinstatement" (at pg. 349E). This approach effectively retained the common law position which makes the remedy of reinstatement almost unavailable. While the Act certainly gave discretion to a "determining authority" to order or not to order reinstatement, it was wrong to see this discretion in the same way as that of the common law. There is little point in enacting legislation that rigorously restricts termination of employment if that legislation can be flouted without the employer suffering an order of reinstatement. It is therefore submitted that the better view is that the discretion given by the Act should therefore be exercised generally in favour of reinstatement except in impractical circumstances.

However, this is now academic after the enactment of the Labour Relations Act Amendment Act (No. 12 of 1992) which went even further than the common law in denying the remedy of reinstatement. The amendment provides that where reinstatement is ordered, the order should also "specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment" (see section 96).

This amendment effectively sealed the fate of reinstatement as an order under part XIII of the Labour Relations Act. Every order of reinstatement made should give the employer the option of paying damages instead. There can be no question of an employer being obliged to reinstate under part XIII of the Labour Relations Act.

What of orders outside part XIII of the Act? Part XIII of the Act is not the only part dealing with termination of employment. Issues relating to termination of employment under SI 371/85 and in particular, situations where an employee is summarily suspended without pay pending permission to dismiss from a labour relations officer fall outside it. Before 1996, there was great scope for reinstatement under SI 371/185 owing to the approach which the supreme court had enunciated, albeit *obiter*, in *Masiyiwa v T M Supermarket*.<sup>15</sup> In

12 *Supra*.

13 At p. 131D-E.

14 *Supra*.

15 1990 (1) ZLR 166.

that case, the Supreme Court held, *obiter*, that a labour relations officer faced with an application to dismiss under section 3 of SI 371/85 had only two choices: dismiss or reinstate. He had no discretion, if he/she found that the misconduct allegations had been provided, he/she had to reinstate. He could not, for instance, order the payment of damages by the employer where he found the allegations not to have been proved but felt that reinstatement was inappropriate. This was followed in a number of cases.<sup>16</sup> The Supreme Court then put this approach on a firm footing in *United Bottles v Murwisi*.<sup>17</sup> However, barely a year after the *United Bottles v Murwisi* judgement, the Supreme Court changed its approach.

In the case of *Nicholas Hama v National Railways of Zimbabwe*,<sup>18</sup> the Supreme Court held that in an application under section 3 of SI 371/85, a labour relations officer was not limited to the two choices of either dismissing or reinstating, but had the further choice of ordering the payment of damages in place of reinstatement. The reasoning which led to this further restriction on the remedy of reinstatement demonstrates beyond doubt the Supreme Court's shocking failure to appreciate the essence of the Labour Relations Act: it reasoned that there was nothing in the Act to show that the legislature intended to depart from the common law of "reinstatement or damages". It is difficult to support this reasoning on two grounds. First, section of SI 371/85 deals with a specific issue of summary suspension without pay on alleged misconduct. The employer is required to prove the alleged misconduct before permission to dismiss is granted. It should follow that where the employer has failed to prove the misconduct, the basis of the suspension should fall away and the employee should return to work. It is not even accurate to speak of "reinstatement" where an employee has been suspended because there is no dismissal. The law maker could surely not have intended to make an unlawful suspension to be remedied by the payment of damages and not simply by the nullification of the suspension. The common law principle of "reinstatement or damages" is irrelevant to cases of suspension which are quite distinct from cases of dismissals. Secondly, there is no provision for the making of orders relating to the payment of damages under SI 371/85. The law maker conceived this legislation to control unlawful termination of employment. It obliges an employer to seek the approval of the Ministry of Labour before terminating employment. The scheme is therefore that one either gets the permission to terminate or does not get such permission. There is no scope for the payment of damages.

Be that as it may, the effect of *Nicholas Hama v National Railways of Zimbabwe* is that even under SI 371/85, reinstatement is now almost unavailable as the common law approach has now taken over. The courts will use their discretion in line with common law principles to almost invariably refuse reinstatement.<sup>19</sup>

An area which has not yet been clarified is where an employee has been dismissed pursuant to proceedings under a registered code of conduct.<sup>20</sup> If the proceedings thereof were irregular, the dismissal is unlawful. The Supreme Court has recently held that the Labour Relations Tribunal has no jurisdiction to review proceedings under Codes of Conduct and an employee seeking review should approach the High Court.<sup>21</sup> Assuming that the employee

16 See *Kadoma Magnesite (Pot) Ltd v Acting Regional Hearing Officer* 1991 (1) ZLR 283 (H); *Whole sale Centre (Pot) Ltd v Mehlo and Ors* 1992 (1) ZLR 376 (H); *Zimbabwe Mining and Smelting v Mafuku* SC 246/92; *Caltex Oil (Zimbabwe) Ltd v Mutsvangwa* SC 95/93.

17 SC41/95.

18 SC 96/96.

19 See, for example, the case of *Winterton, Holmes and Hill v Paterson* SC 115/9.

20 See section 101 of Labour Relations Act for registration of codes.

21 See *Minerals Marketing Corporation of Zimbabwe v Mazvimavi* SC 205/95.

is successful on review, the order nullifying the proceedings effectively means that the employee is to be reinstated. It is submitted that in this way reinstatement is still available where the employee succeeds on review although this may be short-lived should the employer resort to proper procedures of dismissal.

### **CIVIL SERVANTS ENTITLED TO REINSTATEMENT?**

A final point needs to be made. The Labour Relations Act does not apply to public service employees and the position discussed above as regards statutory reinstatement does not apply to them. The position of civil servants is governed by the common law, which has been favourable to them as regards reinstatement. The common law created an exception to its rule of denying specific performance in employment contracts to allow reinstatement of unlawfully dismissed civil servants on the basis that they were governed by a particular statute.<sup>22</sup> This is still the position today.<sup>23</sup>

### **CONCLUSION**

The remedy of reinstatement is now virtually unavailable in Zimbabwe, except to civil servants. Both the Labour Relations Act and the Supreme Court have, in different ways, reduced reinstatement to a meaningless remedy. However, as already shown in this note, the approach of the Supreme Court to reinstatement has taken away the remedy of reinstatement even in cases where the Labour Relations Act should be taken to have intended its meaningful availability. Nothing short of very clear provisions in the Act will restore reinstatement as a remedy in Zimbabwean labour law.

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22 See *Schierhout v Minister of Justice* (*supra*).

23 See *Zimbabwe Teachers Association v Minister of Education and Culture* 1990 (2) ZLR 48; *Chairman of the Public Service Commission v Muromahoko* 1992 (1) ZLR 304 (S).



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